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JUDICIARY COMMITTEE: March 2, 2009 PUBLIC HEARING

Testimony of Carolyn Signorelli
Chief Child Protection Attorney

SB No. 1057
HB No. 6404
HB No. 6451

Commission on Child Protection
State of Connecticut

Office of the Chief Child Protection Attorney

Senator McDonald, Representative Lawlor and esteemed Committee Members, for the record I am Carolyn Signorelli, Chief Child Protection Attorney, with the Commission on Child Protection and would like to begin by thanking the Chairs and the Committee for raising three bills based upon proposals I submitted on behalf of the Commission:

Senate Bill 1057 clarifies the respective authority of the court and the Chief Child Protection Attorney in the assignment of children's attorneys and the roles of attorneys and GAL's in child protection proceedings; House Bill 6404 grants indemnification and statutory immunity for state paid contract attorneys providing representation to children and indigent parents in our family and juvenile courts; and House Bill 6451, contains technical amendments regarding the Commission on Child Protection, as well as measures to ensure the right of children to independent counsel and to permit a multi-disciplinary model of legal representation in child protection matters.

S.B. No. 1057 (RAISED) AN ACT CONCERNING APPOINTMENTS OF COUNSEL AND GUARDIAN AD LITEMS IN CERTAIN JUVENILE MATTERS.

The amendments to C.G.S. § 46b-129a found at **p. 1, lines 10 - 12** clarifies that the Chief Child Protection Attorney is responsible for assigning attorneys to children in child protection cases, except when there is an immediate need during a court proceeding for the court to appoint an attorney. This clarification will render § 46b-129a consistent with the Commission's enabling legislation and with Court Rule 32a-1(b) (attached).

The following amendments are aimed towards clarifying the duties attorneys and GAL's owe to the children they represent in child protection proceedings and towards increasing attorney accountability to their clients, the Commission and the Court:

1. Children 7 years of age or older receive traditional client directed representation from an attorney **(p. 1, l. 14 - p. 2, l. 15)**;

2. Children are appointed a separate GAL if it is established that they are incapable of acting in their own interests consistent with Rule of Professional Conduct 1.14 **(p. 2, lines 22 – 27).**

3. The role of a GAL is also more clearly defined by requiring the GAL to conduct an independent investigation and to provide the court with all information relevant to a determination of the child's best interest **(p. 2, lines 28 – 30)**.

4. Exceptions are established from the general rule that the Commission on Child Protection pays for the legal and GAL representation of children in juvenile matters. **(p. 2, l. 42 – p. 3, l. 52)**.

Discussion: Amendments to C.G.S. § 46b-129a:

The field of legal representation in child protection matters has been moving in the direction of improving the advocacy for children in neglect and abuse proceedings by providing trained attorneys committed to zealously advocating for children's interests in court. See, ABA/NACC Revised Standards of Practice for Lawyers Who Represent: http://www.naccchildlaw.org/resource/resmgr/Docs/juvenilejustice.doc and Connecticut Standards of Practice for Attorneys and Guardians Ad Litem Representing Children in Child Protection Matters (excerpts attached).

Connecticut's current model of child representation mandated by C.G.S. § 46b-129a requires that representatives for children in neglect and abuse proceedings act as both an attorney and a guardian ad litem (GAL). This creates an inherent conflict in the representation since an attorney owes a duty of loyalty and confidentiality to the wishes of his or her client, but a GAL has no such duty and is obligated to advocate for what he or she determines to be in the child client's best interest. The current language in C.G.S. § 46b-129a states: "When a conflict arises between the child's wishes or position and *that which counsel for the child believes is in the best interest of the child,* the court shall appoint another person as guardian ad litem for the child." The combination of this dual role and subjective standard of "best interest" to determine that a conflict exists has permitted attorney/GAL's for children to act more as GAL than attorney. Some attorneys do not work to establish an attorney-client relationship with child clients, do not diligently discern the expressed or implied wishes of children and substitute their subjective judgment of what is n the best interest of children when they advocate before the court or seek a separate GAL. This practice severely limits a child's rights as a party to be legally represented and to be heard in court proceedings.

This proposal seeks to eliminate that problem for children 7 years of age or older by simply assigning them an attorney and making it clear the attorney's sole responsibility is to provide client directed representation unless the more stringent requirements for protective action of Rule 1.14 are met.[1] Rule 1.14 requires that the client be under an impairment that renders them incapable of reaching an informed decision in relation to the subject matter of the representation. It further requires that that impairment and lack of judgment in relation to the client's own interests is likely to have serious adverse consequences if the attorney does not take protective action. This approach is consistent with a child's party status in juvenile proceedings and with the Commentary to Rule 1.14 which states, "Nevertheless, a client with impaired capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." Conn. Prac. Bk. 1.14, Commentary (attached).

Discussion amendments to C.G.S. § 46b-136:

This amendment renders section 46b-136 consistent with recent changes to Conn. Prac. Bk. § 32a-1(e) and (f). This statute provides for the judicial authority's discretion to appoint counsel in the interest of justice, even where a party might otherwise not be entitled to state paid legal representation. For example, in some delinquency matters parents who are found able to afford to hire counsel for their child fail to do so, yet the court believes the child must be represented. The Chief Child Protection Attorney will assign counsel, the court will assess costs to the responsible party and the Chief Child Protection Attorney can seek reimbursement for the costs of that representation. Another instance where this statute is utilized by the judicial authority is for parents in child protection cases who do not qualify as indigent, but cannot or do not obtain their own attorney. The court can rule that the interest of justice requires that a state paid attorney be appointed by the judicial authority and assigned by the Chief Child Protection Attorney. **(p. 3, l. 64 – p. 4, l. 82).**

H.B. 6404 (RAISED) AN ACT CONCERNING INDEMNIFICATION AND IMMUNITY FOR CERTAIN CHILD PROTECTION AND GUARDIAN AD LITEMS.

On behalf of the Commission, I have also submitted amendments to C.G.S. §§ 4-141 (p. 2, lines 26 – 28) and 4-165 (p. 4, lines 79 – 81)to include the attorneys providing representation pursuant to C.G.S. § 46b-123d(a)(1) in the

[1] The Commission has obtained an opinion from the Children's Bureau of the Federal Dept. of Human Services that this proposal will not violate CAPTA and therefore not jeopardize federal reimbursement. (attached).

definition of state employee for purposes of indemnification and immunity from liability for negligence.

Juvenile Contract attorneys providing representation in child protection matters should be considered equivalent to special public defenders for purposes of immunity because they are independent attorneys contracting with the state to provide representation to indigent individuals who are constitutionally and statutorily entitled to representation.[2] Although these contractors are not direct employees of the state, both special pubic defenders and attorneys that contract with the Chief Child Protection Attorney provide legal representation that the state is required to provide due to the liberty interests at stake and its interference in those liberty interests.

This representation is essential to the state's ability to perform certain functions. Specifically, juvenile contract attorneys assist the judicial system in fulfilling the court's role as arbiter of matters between the State Department of Children and Families, the parents as the respondents brought before the court by the state, and the children who are the subject of the state's petitions. These attorneys, just as special public defenders serve to protect the constitutional rights of indigent criminal defendants, serve to protect the constitutional right of parents and children to family integrity. Therefore, statutory immunity pursuant to § 4-165, should be extended to these attorneys. The amendment also includes the contract attorneys who defend putative fathers and parties facing incarceration in family matters because similar to public defenders they protect the liberty and property rights of putative fathers entitled to a fair adjudication of paternity and the liberty interests of contemnors in family matters cases who are threatened with incarceration.

This bill constitutes an important measure in my efforts as Chief Child Protection Attorney to raise awareness of the importance of this work and gain recognition of the valuable role these attorneys play in the state's ability to preserve the rights of children and families in our child welfare system. In order to attract more competent attorneys to this field, the current lack of prestige associated with the practice needs to improve. To that end I have facilitated Child Welfare Law's recognition in this state as a legal specialty; enactment of this bill will compliment my efforts to raise the bar in the practice of child protection.

In addition, by providing this immunity from negligent behavior, the legislature will ***not*** be removing accountability for these attorneys or reducing the protections for these clients. It must be acknowledged that one of the reasons for the creation of the Commission on Child Protection was the recognition that many attorneys in this field were not adequately representing the interests of

[2] Pursuant to P.A. 76-371 Sec. 2, the legislature added public defenders, including special public defenders, to the definition of state employees for purposes of entitlement to qualified immunity under C.G.S. § 4-165.

their clients and that the existing system of representation was not working well. Historically parents had the right to sue for negligent representation, yet the accountability and protection that opponents of this bill attribute to that right was not realized.

A much more effective way to ensure that these clients receive exemplary legal representation is to attract better attorneys to the field; train them in child protection law and practice; provide them with the tools necessary to advocate for their clients; limit their caseloads and hold them to high standards of practice. We can increase the prestige in which the field of child welfare law is held by acknowledging the important role it plays in our system of child welfare and justice, thus attracting better attorneys. Providing immunity and indemnification for these attorneys is one important step to achieve that goal and improve the child protection bar.

For attorneys who wish to focus their practice in this area and become child welfare experts and specialists, the immunity will provide a much needed financial incentive through savings in malpractice insurance costs. Moreover, granting statutory immunity does not remove other means of holding incompetent attorneys accountable, including actions for intentional conduct, the grievance process and loss of their annual contract with the Commission.

For these reasons, I respectfully request that the Committee vote favorably on H.B. 6404.

H.B. 6451 (RAISED) AN ACT CONCERNING THE COMMISSION ON CHILD PROTECTION AND THE CHIEF CHILD PROTECTION ATTORNEY.

H.B. 6451 makes four changes to the Commission's enabling legislation:

1. Section 1 adds a subsection (j) to C.G.S. § 46-123c. This subsection will establish that the Commission on Child Protection is only required to pay for one original transcript when multiple parties that it provides representation for are part of an appeal taken by one of its clients. **(p. 1, lines 3 – 8)**. If the appeal is taken by the Attorney General's Office, the Commission on Child Protection is only responsible to pay for the costs of copies of the additional transcripts required by its contract attorneys. **(p. 1, lines 9 – 13)**.

2. A technical amendment to clarify that the Chief Child Protection Attorney can contract with law firms is contained in section 46b-123c(1)(B)(ii). **(p. 2, l. 29)**.

3. A new subdivision (B) has been included in division (2) of section 46b-123c in order to clarify that the legislature intended the office of the Chief Child Protection Attorney to provide an attorney pursuant to its established system of representation to each and every child who is the subject of an abuse, neglect or termination petition in juvenile court. **(p. 2, lines 35 – 37).**

4. This new provision added to section 46b-123d(b) creates an exception to the mandated reporting requirements of sections 17a-101 et. seq. for social workers or other mandated reporters employed by an attorney providing legal services pursuant to this section. In furtherance of the multi-disciplinary agency model of legal representation encouraged by subsection, the amendment would apply the attorney-client privilege to the social workers or other mandated reporters working for an attorney under this section. **(p. 3, lines 54 – 65).** The bill proposes that the exception be contained within the mandated reporting statute as well. **(p. 3, lines 75-77).**

Discussion new section 46b-123c(2)(B) referenced above in # 3:

I have proposed this section because there is some disagreement over whether or not the system of legal representation established by the Chief Child Protection Attorney pursuant to P.A. 05-3, Sections 44-46, was intended to apply to all children subject to neglect, abuse or termination of parental rights petitions in juvenile court or only to the children of indigent parents. This debate stemmed from a circumstance where non-indigent respondent parents hired and paid for counsel to file an appearance on behalf of the children they were accused of neglecting and abusing.

It is my position, as well as that of the Commission, that:

i. The plain language of our enabling statute makes no distinction based upon indigent status with respect to our responsibility to assign counsel for children[3]; in fact, section 46b-129a, the statute prior to the Commission's establishment that provided for the appointment of counsel for children by the court, also makes no reference to indigent status of a child's parent being found prior to the court's obligation to appoint counsel for a child;

ii. There exists a conflict that is not consentable under the Rules of Professional Conduct where the respondent-parents in a neglect and abuse petition hire, pay for and have the ability to fire counsel for their child who is the subject of the petition, requiring the child to provide informed consent. See Rules of Professional Conduct: 1.7(a)(2), 1.8(f), 5.4(d)(3) (attached). Matters concerning the consequences of and alternatives to one's parent providing legal representation in a child protection proceeding is not a matter typically considered within the ability of a child to "understand, deliberate upon, and reach conclusions about..." for purposes of providing the informed consent required by Rule 1.8(f)(1). (See, Rule 1.14, Commentary);

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[3] C.G.S. § 46b-123d(a)(1) provides: "The Chief Child Protection Attorney appointed under section 46b-123c shall: Establish a system to provide ... (B) legal services and guardians ad litem to children, youths and indigent legal parties in proceedings before the superior court for juvenile matters." Note that the word indigent does not refer to or qualify children or youths, just legal parties in addition to children or youth.

iii. Permitting wealthier parents to choose and hire counsel for their allegedly abused or neglected children would mean that wealthier respondent-parents would have a greater right and ability to control the course of the proceedings, flow of information to the court and ultimate outcome of the case, than that of indigent parents. Conversely, children of wealthier parents would have less guarantees of independent legal counsel owing a duty of loyalty only to them, than children of indigent parents; and

iv. Unlike the situation where attorneys representing sibling groups in these cases assess whether or not their representation of any of the siblings will be materially limited, the risks of inadequate protection of the child client's rights, interests and well-being where counsel is hired and paid by the child's parents in a neglect and abuse proceeding are too significant to conduct case specific inquiries about the ability of counsel to provide conflict free representation. The risk that an attorney's independent professional judgment and his or her ability to maintain an unfettered attorney-client relationship will be compromised when the person who may have abused or neglected their client is paying them, warrants the current statutory framework whereby originally the court and now the Chief Child Protection Attorney automatically assign counsel to children regardless of their parents' financial status. This amendment seeks to make that clear.

I respectfully request that the Committee vote to approve H.B. 6451.

Thank you for this opportunity to be heard. If there are any questions, I welcome them at this time.

Respectfully Submitted

Carolyn Signorelli

MATERIALS RE: HB 6451

use of a means of communication that would otherwise be prohibited by this Rule.

Former Client. The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9 (c) (2). See Rule 1.9 (c) (1) for the prohibition against using such information to the disadvantage of the former client.

Rule 1.7. Conflict of Interest: Current Clients

(Amended June 26, 2006, to take effect Jan. 1, 2007.)

(a) Except as provided in subsection (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under subsection (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or the same proceeding before any tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(P.B. 1978-1997, Rule 1.7.) (Amended June 26, 2006, to take effect Jan. 1, 2007.)

COMMENTARY: **General Principles.** Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0 (f) and (c).

Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under subsection (a) and obtain their informed consent, confirmed in writing. The clients affected under subsection (a) include both of the clients referred to in subsection (a) (1) and the one or more clients whose representation might be materially limited under subsection (a) (2).

A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of subsection (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the persons and issues involved. See also Commentary to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Commentary to Rule 1.3 and Scope.

If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of subsection (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9; see also the next paragraph in this Commentary and the first paragraph under the "Special Considerations in Common Representation" heading, below.

Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9 (c).

Identifying Conflicts of Interest: Directly Adverse. Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation. Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of

action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons. In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts. The lawyer's own interests must not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients; see also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

A lawyer is prohibited from engaging in a sexual relationship with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8 (j).

Interest of Person Paying for a Lawyer's Service. A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8 (f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of subsection (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations. Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in subsection (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under subsection (b) (1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

Subsection (b) (2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law.

Subsection (b) (3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or the same proceeding before any tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0 (n)), such representation may be precluded by subsection (b) (1).

Informed Consent. Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0 (l) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See second and third paragraphs under the "Special Considerations in Common Representation" heading in this Commentary, below (effect of common representation on confidentiality).

Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing. Subsection (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records

and transmits to the client following an oral consent. See Rule 1.0 (c); see also Rule 1.0 (o) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0 (c). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent. A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict. Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of subsection (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future conflicts that might arise and the actual and reasonably foreseeable adverse consequences of those conflicts, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under subsection (b).

Conflicts in Litigation. Subsection (b) (3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by subsection (a) (2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of subsection (b) are met.

Ordinarily, a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying subsection (a) (1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts. Conflicts of interest under subsections (a) (1) and (a) (2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see second paragraph under "Identifying Conflicts of Interest: Directly Adverse" heading in this Commentary, above. Relevant factors in determining whether there is significant risk of material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See first paragraph under "Identifying Conflicts of Interest: Material Limitation" heading in this Commentary, above.

For example, conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration, the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients

have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege.

As to the duty of confidentiality, continued common representation will almost certainly be inappropriate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and the lawyer should inform each client that each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. To that end, the lawyer must, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides prior to disclosure that some matter material to the representation should be disclosed to the lawyer but be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2 (c).

Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients. A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13 (a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Conflict Charged by an Opposing Party. Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Rule 1.8. Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction, including investment services, with a client or former client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client or former client unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client or former client and are fully disclosed and transmitted in writing to the client or former client in a manner that can be reasonably understood by the client or former client;

(2) The client or former client is advised in writing that the client or former client should consider

the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in the transaction;

(3) The client or former client gives informed consent in writing signed by the client or former client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction;

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction; and

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and either (B) that the lawyer will provide legal services to the client or former client concerning the transaction, or (C) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn to for legal services concerning the transaction. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a) (1) through (a) (5), the phrase "former client" shall mean a client for whom the two-year period starting from the conclusion of representation has not expired.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may pay court costs and expenses of litigation on behalf of a client, the repayment of which may be contingent on the outcome of the matter;

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) The client gives informed consent; subject to revocation by the client, such informed consent shall be implied where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense;

(2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) Information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement. Subject to revocation by the client and to the terms of the contract, such informed consent shall be implied and need not be in writing where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss and the third party elects to settle a matter without contribution by the client.

(h) A lawyer shall not:

(1) Make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) Settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) Acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) Contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing subsection (a) through (i) that applies to any one of them shall apply to all of them.

(P.B. 1978-1997, Rule 1.8.) (Amended June 26, 2006, to take effect Jan. 1, 2007; amended June 29, 2007, to take effect Jan. 1, 2008.)

COMMENTARY: **Business Transactions between Client and Lawyer.** Subsection (a) expressly applies to former clients as well as existing clients. A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of subsection (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in subsection (a) are unnecessary and impracticable.

Subsection (a) (1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Subsection (a) (2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Subsection (a) (3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0 (f) (definition of informed consent).

The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of subsection (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

If the client is independently represented in the transaction, subsection (a) (2) of this Rule is inapplicable, and the subsection (a) (1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as subsection (a) (1) further requires.

Use of Information Related to Representation. Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Subsection (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Subsection (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2 (d), 1.6, 1.9 (c), 3.3, 4.1 (b), 8.1 and 8.3.

Gifts to Lawyers. A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, subsection (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should

advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights. An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Subsection (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and subsections (a) and (i).

Financial Assistance. Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services. Subsection (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4 (c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7 (a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7 (b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that subsection. Under Rule 1.7 (b), the informed consent must be confirmed in writing.

Aggregate Settlements. Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2 (a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0 (f) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims. Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This subsection does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this subsection limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation. Subsection (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like subsection (e), the general rule, which has its basis in common-law champerty and maintenance, is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in subsection (e). In addition, subsection (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for

(1) A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(2) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(3) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(A) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(B) The lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(P.B. 1978-1997, Rule 5.3.) (Amended June 26, 2006, to take effect Jan. 1, 2007.)

COMMENTARY: Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Subdivision (1) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See first paragraph of Commentary to Rule 5.1. Subdivision (2) applies to lawyers who have supervisory authority over the work of a nonlawyer. Subdivision (3) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) A lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed upon purchase price; and

(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(P.B. 1978-1997, Rule 5.4.) (Amended June 26, 2006, to take effect Jan. 1, 2007.)

COMMENTARY: The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in subsection (c), such arrangements should not interfere with the lawyer's professional judgment.

This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8 (f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Rule 5.5. Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so. The practice of law in this jurisdiction is defined in Practice Book Section 2-44A. Conduct described in subsections (c) and (d) in another jurisdiction shall not be deemed the unauthorized practice of law for purposes of this paragraph (a).

(b) A lawyer who is not admitted to practice in this jurisdiction, shall not: